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No. 82-433

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LINMARK ASSOCIATES, INC.,
Petitioner

v.

ROBERT E. LIPSCHUTZ ASSOCIATES, INC.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPONDENT'S BRIEF IN OPPOSITION

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TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Robert E. Lipschutz Associates, Inc., by its counsel, respectfully requests this Court to deny the Petition for Certiorari for the reasons set forth herein.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey is not reported. A shortened version appears as Appendix C to the petition for certiorari.

The Court of Appeals for the Third Circuit did not render any opinion. That court's order affirming the judgment of the District Court appears as Appendix A to the petition for certiorari, and its order denying the Petition for rehearing appears as Appendix B to the petition for certiorari.

JURISDICTION

The jurisdiction of this Court to review the decision of the Court of Appeals for the Third Circuit is based on 28 U.S.C. §2854(1).

QUESTION PRESENTED

Whether, in a diversity suit in which the jury found plaintiff entitled to be paid for construction work performed, this Court should exercise its supervisory power by granting a new trial because:

(a) the district court, without objection, asked one of defendant's witnesses who collected a commission from the seller and shared it with the buyer, whether his returning that part of the purchase price to the buyer was a kickback, and

(b) the trial judge, without objection, questioned defendant's witnesses about some details of the transactions involved?

STATEMENT OF THE CASE

Respondent, a building contractor, recovered a judgment of $112,509.05 for work done, and $16,817.78 for pre-judgment interest against defendant, in a diversity action in the District Court for the District of New Jersey.

After entry of judgment against petitioner in the district court, he filed an appeal with the Court of Appeals for the Third Circuit. That court affirmed the judgment without opinion and denied petitioner's petition for rehearing.

In this Court, petitioner relies upon two short episodes during a five-day trial as grounds for invoking this Court's supervisory power over the lower federal courts:

> (1) When one of petitioner's witnesses, a real estate broker, testified that he had returned to the purchaser part of the commission which the seller had paid to him (the broker-witness), the district court asked the witness whether that payment to the purchaser was a "kickback". Petitioner's counsel did not object to the question, and his witness denied that the payment was a kickback. When petitioner's counsel later objected to the use of the term "kickback" by respondent's counsel, his objection was overruled.
>
> (2) Later in the trial, the district court, without objection by petitioner's counsel, asked two of petitioner's witnesses questions which were calculated to clarify for the jury the complicated factual situation concerning ownership of the land, the various contracts involved, and the confusing financial details.

REASONS FOR DENYING THE WRIT

I. THE DISTRICT COURT'S INQUIRY AS TO EXISTENCE OF A "KICKBACK" WAS UNOBJECTIONABLE.

It was not improper for the district court to ask the witness whether his returning part of the purchase money to the purchaser was a "kickback", because that is exactly what it was. The broker-witness sold the property for a specified amount, out of which a specific commission was to be paid to him, and he agreed to return part of that amount to the purchaser. That is a "kickback" in the common, ordinary, everyday understanding of that word, as well known to the jury as to all others.

For example, in addition to the definition quoted in the district court's opinion, the term "kickback" defined in Webster's New Collegiate Dictionary (1959) as "a return of a part of a sum received, as of wages, commission, fees, etc. specif. because of a confidential agreement or coercion."

Similarly, The World Book Dictionary (1970) defines the term "kickback" as meaning "to return (a portion of the money received as a fee), often as the result of coercion or a previous arrangement."

Finally, in Webster's New Twentieth Dictionary (2d 1979), the term "kickback" is defined as "A giving back of part of money received as payment, commission, etc., often as a result of coercion or previous understanding."

This Court would have difficulty in chastising a district court for *asking* a witness about such an accurate characterization. Even if the district court had asserted that the payment was a kickback — which he did not — such a statement would have been unassailable.

II. THE "KICKBACK" ISSUE IS NOT OPEN IN THIS COURT BECAUSE PETITIONER DID NOT OBJECT WHEN THE DISTRICT COURT MADE ITS INQUIRY.

As disclosed by the excerpts from the trial transcript on page 4 of the petition, petitioner's counsel did not object when the district court asked petitioner's witnesses "Is it a kickback of a part of the purchase price?" By not objecting, counsel not only revealed that he too recognized the "kickback" as such; he also waived any objection. Consequently, the issue is not open in this Court.

Applying the philosophy of Rule 46 of the Federal Rules of Civil Procedure, the Courts of Appeals have consistently held that, unless there has been a miscarriage of justice — which could not be asserted in this case — a party cannot raise objections to events and rulings at trial for the first time on appeal. See, for example: *Morreale v. Downing*, 630 F.2d 286 (5th Cir. 1980); *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979); *Wellman v. Jellison*, 593 F.2d 876 (9th Cir. 1979); *Magill v. Westinghouse Electric Corporation*, 464 F.2d 294 (3rd Cir. 1972).

Obviously, there can be no miscarriage of justice in affirming a jury verdict which merely allowed a builder to recover for work performed. The decision of the Court of Appeals is therefore correct, whether it be based on the absence of error on the part of the district court, or waiver of the "kickback" issue by petitioner's failure to make timely objection when the inquiry was made.

III. THE DISTRICT COURT'S QUESTIONING FOR THE GUIDANCE OF THE JURY WAS NOT ONLY UNOBJECTIONABLE BUT NOT OBJECTED TO BY PETITIONER'S COUNSEL.

The district court asked questions to clarify the details of the complicated real estate transaction and the financial aspects of the agreements and their performance. The district court unquestionably had the right to make such inquiries. The district court has the "power to elicit the truth by an examination of the witness." *Glasser v. United States*, 315 U.S. 60, 82, 62 S.Ct. 457, 470 (1941).

As Mr. Chief Justice Hughes said in *Herron v. Southern Pacific Company*, 283 U.S. 91, 95; 51 S.Ct. 383, 384, (1931):

> "In a trial by jury in a Federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides."

This case involved complicated factual and financial questions. The trial lasted five court days and involved extensive, complex exhibits as well as live testimony. In such a case, it is the prerogative of the trial judge to take an active role to see that the jury understands the case so that justice will be accomplished. As the Court of Appeals stated in *Heron v. Heron*, 393 F. 2d 652, 656 (3d Cir. 1968):

> "It is axiomatic that the function of a trial judge in a federal court is much more than that of a mere arbitrator to rule upon objections and to instruct the jury. It is his function to conduct the trial in an orderly way with a view to eliciting the truth and to obtaining justice between the parties. *Knapp v.*

> *Kinsey*, 232 F.2d 458, 466 (6th Cir.) *cert. denied* 52 U.S. 92, 77 S.Ct. 131,1 L.Ed. 2d 86 (1956). 'i[t] is his duty to see that the issues are not obscured and that the testimony is not misunderstood.' "

See, *Hite v. Western Maryland Railway*, 217 F.2d 781 (4th Cir. 1954) *cert. den.* 349 U.S. 96, 75 S.Ct. 890 (1954); *Powers v. I. B. Michael & Co.*, 329 F.2d 674 (6th Cir. 1964) *cert. den.* 377 U.S. 980, 84 S.Ct. 1886 (1964)

Particularly where the issues are complex, it is the duty of the trial judge to intervene in the proceedings, because ". . . a judge is not wholly at the mercy of counsel, and would be remiss if he did not participate in questioning to speed proceedings and eliminate irrelevancies." *Riggs, Ferris & Geer v. Lillibridge*, 316 F.2d 60, 61 (2d Cir. 1963).

The degree of court participation in the trial of any case is within the sound discretion of the trial judge. *Kolman v. Jacoby*, 419 F.2d 395 (3d Cir. 1969). The questions here involved were appropriate to assist the jury in properly understanding the facts and circumstances of this case. This was particularly true with reference to the court's questions with regard to ownership of the land and the building, which were necessary for clarification of important issues in the case.

Since no conduct by the trial judge was inconsistent with substantial justice to the parties, petitioner was not entitled to a new trial.

Moreover, as the excerpts from the trial transcript included in the petition show, petitioner's counsel did not at any time object to any of the district court's questions. Consequently, even if there were such an issue in this case at the trial court level, it is not open in this Court, for reasons already outlined.

CONCLUSION

For all the foregoing reasons, in addition to the fact that this case presents no conflict of decisions and no issue of importance to anyone other than these particular litigants, the petition for certiorari should be denied.

Respectfully submitted,

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